Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

JANICE L. MATTOX AND JERRY S. MATTOX,
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENT OF THE
CITY OF DALLAS,
Defendant-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

COUNSEL OF RECORD:
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April 14, 1993

CITY OF DALLAS

Janice Mattox
1110 Valencia
Dallas, Texas 75223

Re: BDA 92T-034
5003 Reiger Avenue

Dear Ms. Mattox:

The Board of Adjustment at its public hearing held on Tuesday, April 13, 1993 provided a compliance date of December 31, 1993 for the nonconforming car wash use currently being operated on the subject property. In accordance with the Board's instruction, the Building Official will revoke the current Certificate of Occupancy on December 31, 1993. This action was filed in the Board's office on April 14, 1993. Should you decide to appeal the Board's findings, you have 10 days to appeal to district court.

Should you have any further questions regarding the Board's action, please contact me at 670-4206.

Sincerely,

/s/Elias Martinez, AICP
Administrator, Board of Adjustment
Department of Planning and Development
1500 Marilla, Room 5BN
Dallas, Texas 75201

km/AL:3

c: Munger Place Historic Dist. Assoc.
P.O. Box 140524
Dallas, Texas 752124

Keith Jackson
4901 Victor St.
Dallas 75214

Gene Akard
Ramiro Lopez
File

Civil No. 3:93-CV-1043-H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANICE L. MATTOX and JERRY S. MATTOX,
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENTS OF THE
CITY OF DALLAS,
Defendant-Appellee.

JUDGMENT

This Judgment is entered pursuant to the Court's Findings of Fact and Conclusions of Law filed January 5, 1996.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the decision of the Dallas Zoning Board of Adjustment is **AFFIRMED**; that Plaintiffs take nothing by their suit against Defendant; and that

this case be, and it is hereby, **DISMISSED** on the merits at Plaintiffs' cost.

SIGNED this 5 day of January, 1996.

/s/ BAREFOOT SANDERS, Senior Judge
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

Civil No. 3:93-CV-1043-H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANICE L. MATTOX and JERRY S. MATTOX,
Plaintiffs-Appellants,

versus

BOARD OF ADJUSTMENTS OF THE
CITY OF DALLAS,
Defendant-Appellee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Janice L. Mattox and Jerry S. Mattox ("the Mattoxes") own the relevant property. On April 13, 1993, the Dallas Zoning Board of Adjustment ("the Board") held a public hearing at which it set December 31, 1993, as the termination date for the nonconforming use of the property as a car wash. The Mattoxes seek review of the Board's

decision pursuant to Section 211.011 of the Texas Local Government Code. The Mattoxes contend that the Board abused its discretion under the Dallas Development Code. They contend that the Board acted in an illegal and arbitrary fashion in making the determination, and that the decision regarding the termination date was made without substantial evidence and in violation of their constitutional rights.

The case was tried before the Court without a jury on January 2, 1996. Upon consideration of the testimony and other evidence in this case, the Court makes the following findings of fact and conclusions of law. Any finding may be designated as a conclusion, and any conclusion may be designated as a finding.

I. Findings of fact

1. Plaintiffs became the owners of the relevant property by Deed dated November 1, 1985.

2. Plaintiffs' car wash, located at the intersection of Collett Avenue and Reiger Avenue, is legally described as Lot 1, City Block N/1431, Munger Place Addition, Section No. 2, an addition to the City of Dallas.

3. The Board, at its public hearing on April 13, 1993, voted unanimously to establish a termination date of December 31, 1993, for Plaintiffs'' nonconforming use located at Lot 1, City Block N/1431, Munger Place Addition, Section 2.

4. Plaintiffs' suit was brought to challenge the Board's decision pursuant to § 211.011 of the Local Government Code.

5. At the April 13, 1993 hearing, the Board had before it evidence to support

its determination with respect to the amount of the Mattoxes' investment in the nonconforming use.

6. At the April 13, 1993 hearing, the Board had before it evidence to support its determination that the Mattoxes could recoup their investment in the nonconforming use by December 31, 1993.

7. At the April 13, 1993 hearing, the Board had before it, by operation of law, notices of the ordinances involved, e.g. Ordinance 15820, 1978, creating Planned Development District 97 ("PD97"); Ordinance 16657, August 20, 1980, expanding PD 97; Ordinance 16658, August 20, 1980, authorizing a Historic Designation on property within PD 97; and Ordinance 18541, January 9, 1985, clarifying the "Collett Retail Lots."

8. Use of the Mattoxes' property as a car wash became nonconforming on January

9, 1985, pursuant to the enactment of Dallas City Ordinance 18541.

9. The relevant ordinances and PD 97 File, which provided notice of the nonconforming use of the property as a car wash, were available to the public at the time the Mattoxes purchased the property.

10. The car wash was still in operation as of January 2, 1996, the trial date.

II. Conclusions of law

1. The Court has jurisdiction of this case under 28 U.S.C. § 1331.

2. Venue is proper in the Northern District of Texas.

3. Plaintiffs purchased the car wash as an existing nonconforming use.

4. The Board has authority, pursuant to § 51A-3.102(c) (4) of the Dallas Development Code, to terminate a nonconforming use.

5. At a termination hearing, the "burden is on the Board and other interested parties to present evidence of the owner's investment in the nonconforming use as a basis for an administrative order of termination." Neighborhood Committee on Lead Pollution v. Board of Adjustment of the City of Dallas, 728 S.W.2d 64, 67 (Tex.App.--Dallas 1987, writ ref'd n.r.e.).

6. The standard of review of the Board's decision by this Court is abuse of discretion. Plaintiff has the burden of proving that the Board's decision was illegal and, to do so must present a very clear showing that the Board abused its discretion. Board of Adjustment of Dallas v. Patel, 887 S.W.2d 90 (Tex.App.--Amarillo 1994, writ denied); Board of Adjustment of Dallas v. Winkles, 832

S.W.2d 803, 806 (Tex.App.--Dallas 1992, writ denied).

7. The test for abuse of discretion is whether the Board acted arbitrarily, unreasonably, or without referenced to any guiding rules and principles. Patel, 882 S.W.2d at 89.

8. This Court may not substitute its discretion for that of the Board. Patel, 882 S.W.2d at 89.

9. The Board did not abuse its discretion in establishing a compliance date of December 31, 1993, for the nonconforming use described as Lot 1, City Block N/1431, Munger Place Addition, Section No.2, Dallas, Texas.

10. At the April 13, 1993 hearing, the Board had before it evidence to support its determination with respect to the amount of the Mattoxes' investment in the nonconforming use.

11. At the April 13, 1993 hearing, the Board had before it evidence to support its determination that the Mattoxes could recoup their investment in the nonconforming use by December 31, 1993.

12. In City of University Park v. Benners, 485 S.W.2d 773, 777-78 (Tex. 1972) the Supreme Court of Texas approved the amortization technique of terminating nonconforming uses and limited the tolerance period required for amortization of a nonconforming use to the time necessary for recoupment of the landowner's investment in the structure *at the time of the zoning change*. Id. (emphasis added); § 51A-4.704(a)(1) of Dallas Development Code.

13. The Texas Court of Appeals for the Fifth District, Dallas County, has consistently held that an investment in a nonconforming use that is made *after* the

zoning change is not innocent and thus is not entitled to protection or recognition. Neighborhood Committee on Lead Pollution v. Board of Adjustment of the City of Dallas, 728 S.W.2d 64, 70 (Tex.App.--Dallas 1987, writ ref'd n.r.e.); City of Garland v. Valley Oil, 482 S.W.2d 342, 346 (Tex.App.--Dallas 1972, writ ref'd n.r.e.), cert. denied, 411 U.S. 933 (1973). It follows that Plaintiffs were not entitled to protection of their nonconforming use.

14. In Patel, however, the court held that Dallas Development Code § 51A-4.704(a)(1) provides that the current owner may be entitled to amortize the remainder of the original owner's investment in the property at the time of the nonconformity. Patel, 882 S.W.2d at 89. The Patel court stated that one of the factors the Board must consider is

the "owner's investment in the structures on the property at the time the use became nonconforming." Id.

15. Section 51A-4.704(a)(1) reads, in relevant part:

> (a) Termination of nonconforming uses:
>
> (1) Any person may request that the board establish a termination date for a nonconforming use. Upon receiving such a request, the board shall provide a termination date for the nonconforming use under a plan whereby *the owner's actual investment in the structure(s) prior to the time that the use became nonconforming can be amortized* within a definite time period. The following factors must be considered by the board in determining a reasonable amortization period:
>
> (A) *The owner's capital investment in the structures on the property at the time the use became nonconforming.*

Dallas Development Code, § 51A-4.704(a)(1)(A) (emphasis added).

16. The Patel interpretation of § 51-4.704 is inapplicable here. First, in Patel, there was a major fact issue as to who owned the property at the time the use became nonconforming. Id. at 89. Here, it is clear the Mattoxes did not own the property until after the use became nonconforming. Second, in Patel, both the prior owner and the current owner appealed the decision. In the instant case, the Board did not know the identity of the owner at the time the use became nonconforming. Return[1] at 30.

17. The only logical and feasible reading of § 51A-4.704(a) is that "owner" refers to "owner before the Board for the termination hearing" or "current owner."

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[1] In seeking review of the Board's April 13, 1993 decision, Plaintiffs filed a petition for writ of certiorari. The "Certificate and Affidavit in Response to Writ of Certiorari" ("Return") was admitted as Plaintiffs' Exhibit 1 and was relied on by both parties at trial and in briefing.

Section 51A-4.704(a) serves as a guide to the Board during termination hearings. Unless the Board was faced with a Patel scenario -- where both the prior and the current owner appealed the determination, because it was unclear who owned the property at the time the use became nonconforming -- the owner before the Board for the termination hearing would necessarily be the current owner.

18. Section 51A-4.704(a) only provides for amortization of an "owner's actual investment in the structure(s) prior to the time that the use became nonconforming." The Mattoxes did not purchase the property prior to its use becoming nonconforming. Therefore, the Mattoxes had no investment in the structure prior to the time that the use became nonconforming. See also, Valley Oil, 482 S.W.2d at 346 ("An additional

investment in a nonconforming use cannot extend the period of amortization or otherwise restrict the city's police power. ... the owner of a nonconforming service station, who, with actual or constructive notice of a zoning ordinance, purchases an adjoining lot for the purpose of building a larger station, cannot complain of any hardship by denial of such extended use."). It follows that the Mattoxes were not even entitled to amortization.

19. The Mattoxes' rights to equal protection have not been violated. All nonconforming uses within the City of Dallas are subject to being called before the Board for a compliance hearing. The Mattoxes were not singled out for special treatment by the Board. See Patel, 887 S.W.2d at 94.

20. The Mattoxes were clearly afforded procedural due process in the proceedings before the Board. They received notice of the hearing through the subpoena duces tecum and subsequent rescheduling. (Return at 111-13, 152). They were present at the April 13, 1993 hearing. They were notified of the right to appeal the decision of the Board by letter dated April 14, 1993. (Return at 114). See Cedar Crest No. 10, Inc. v. City of Dallas, 754 S.W.2d 351, 352-353 (Tex.App.--Eastland 1988), cert. denied, 490 U.S. 1081 (1989).

21. The Board's setting of the termination date was not an unconstitutional taking. Rather, the procedure employed by the Board complied with the relevant ordinances and case law, and the Board had before it evidence to support its determination that the

Mattoxes could recoup their investment by December 31, 1993.

Accordingly, the Board's determination is **AFFIRMED**. Judgment shall be entered accordingly.

SO ORDERED.

DATED: January 5, 1996.

/s/ BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10116

JANICE L. MATTOX; JERRY S MATTOX
Plaintiffs - Appellants

versus

DALLAS TX, CITY OF,
Board of Adjustment of the
Defendant - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

Before DAVIS, EMILIO M. GARZA and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED, that the petition for rehearing filed in the above case is **DENIED**.

ENTERED FOR THE COURT:

/s/Emilio M. Garza
United States Circuit Judge
REHG-2

The foregoing is the Supplemental Appendix to the Petitioners' Petition for Writ of Certiorari.

Respectfully Submitted,

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